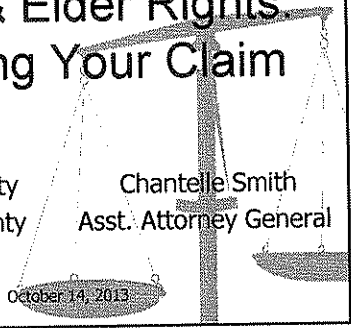


## Ethics & Elder Rights: Guarding Your Claim

Celene Gogerty  
Asst. Polk County  
Attorney

Chantelle Smith  
Asst. Attorney General

October 14, 2013



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## Mickey Rooney Speaks Up



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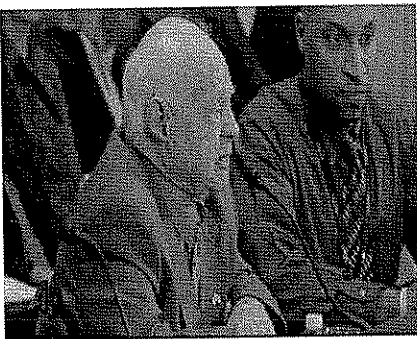
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- The Problem
- Who Calls the Shots?
- Definitions/Statutes
- Special Issues re: Financial Crime

Note: Copyrighted materials used in this presentation are for educational purposes only pursuant to 17 U.S.C. Section 107

## Prevalence

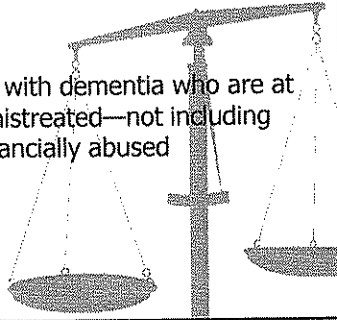
- Chronically underreported
- NY study - Actual incidents **44x** more than reported incidents

## Prevalence

Estimated 3.5%-5.2% of elders are financially exploited

## Prevalence

47% of people with dementia who are at home are mistreated—not including financially abused



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## So What?

"It's a family matter anyway..."

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## So What?

Mild abuse =  
300% increased risk of  
dying

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So What?

4x as likely to be put in  
nursing home

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So What?

Nursing home =  
burden on taxpayers

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So What?

Financial exploitation  
=  
Crime

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## So What?



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## So What?



No money for:

Food  
Mortgage/Rent  
Utilities  
Rx

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## So What?



Taxpayers end  
up paying

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Risk Factors, Signs & Red  
Flags



**OPEN  
PIT**

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Risk Factors for Abuse

- Living with other family
- Dementia
- Social isolation of caretakers/victims
- Caretaker with mental illness, substance abuse or other psychologic pathology
- Abusers that are heavily dependent on the victim

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Does this sound like any of your  
clients?

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Who calls the shots?

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Who is the Client?



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Whoever pays the bill?



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### Not so Fast: Rule 32:1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the attorney's judgment, and attorney-client privilege is protected.

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### Representation in a "Group" Setting

- Rule 32:1.6 (Privilege)
- Third party present
  - Crawford v. Raible (1928)
- Rule 32:1.14 –  
Comment 3  
(Diminished capacity)
- Rule 32:1.14 –  
Comment 4 (Legal  
rep)



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### The Aging Client and Potential Issues

- Standard for capacity to contract
- Standard for incapacity in guardianship law
- Ethical guidelines

\*Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers\*, ABA and APA, 2005

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## Transactional Capacity

Testamentary capacity may exist although capacity to transact business generally, make contracts, and carry on difficult negotiations is lacking.

*Matter of Estate of Baessler*, 561 N.W.2d 88 (Iowa Ct. App. 1997) (abrogated on other grounds)

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## Testamentary Capacity

Testamentary Capacity. A person has the mental ability to make a will if s/he:

1. Knows a will is being made;
2. Knows the kind and extent of [his] [her] property;
3. Is able to identify and remember those persons [he] [she] would naturally give [his] [her] property to; and
4. Knows how [he] [she] wants to distribute [his] [her] property.

Iowa Civil Jury Instructions

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## Conservatorship: Ward's Ability to Contract

A ward for whom a conservator has been appointed shall not have the power to convey, encumber or dispose of property in any manner, other than by will if the ward possesses the requisite testamentary capacity unless court orders.

Iowa Code Section 633.637

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### Rule 32:1.14: Client with Diminished Capacity

Balancing client's rights with abilities

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### Determining Capacity

- Rule 32:1.14, comment 6
- Factors to consider:
  - client's ability to articulate reasoning
  - variability of state of mind
  - ability to appreciate consequences
  - substantive fairness of a decision
  - the consistency of a decision with the known long-term commitments and values of the client

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### Observational Signs of Diminished Capacity

- Cognitive signs
- Emotional signs
- Behavioral signs
- Mitigating factors

"Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers", ABA and APA, 2005

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## Cognitive Signs

- Short-term memory loss
- Communication problems
- Comprehension problems
- Lack of mental flexibility
- Calculation problems
- Disorientation

"Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers", ABA and APA, 2005

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## Emotional Signs

- Significant emotional distress
- Emotional instability/inappropriateness

"Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers", ABA and APA, 2005

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## Behavioral Signs

- Delusions
- Hallucinations
- Poor grooming/hygiene

"Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers", ABA and APA, 2005

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### Mitigating/Qualifying Factors

- Stress, grief, depression
- Reversible medical factors
- Normal fluctuations in mental ability
- Hearing/vision loss
- Individual differences/variability considerations

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### Definitions/Statutes

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### Dependent Adult Abuse vs. Elder Abuse

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**“Dependent Adult” means...**

- Adult
- Unable to protect themselves or obtain services or meet their own needs
- As a result of a physical or mental condition which requires assistance from another

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### Dependent Adult?



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### Factors that Affect Dependency

- Temporal
- Situational
- Intellectual disability without physical disability

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### Dependent Adult?



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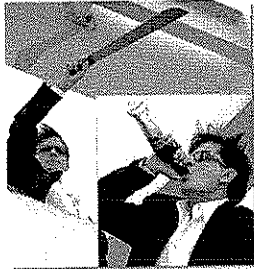
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Dependent Adult?



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Dependent Adult?



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Dependent Adult?



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What if they don't want help?



"It's just a flesh wound!"

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**"Dependent Adult" means...**

- Adult
- Unable to protect themselves or obtain services or meet their own needs
- As a result of a physical or mental condition which requires assistance from another

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**Financial  
Exploitation**

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### 235B Dependent Adult Abuse: Financial Exploitation

- Using or misappropriating
- Funds, property, medications
- With intent to deprive
- Benefits someone else
- Without informed consent of victim
- Caretaker is responsible for exploitation



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### "Informed Consent"

- Nature of transaction/course of conduct
- Disclose all material risks
- Probability of risk
- Available alternatives
- Answer all questions satisfactorily
- Probably needs to be in writing
- Presumes victim is competent

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### 235B – Dual Purpose

- Criminal
- DHS - protective

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### 235B Requirement\*

Abuse as a  
result of acts  
or omission  
of a  
"caretaker"



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### "Caretaker" Means...

- anyone
- responsible  
for providing  
protection,  
care or  
custody



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### 235B Dependant Adult Abuse Crimes

#### Penalties:

Intentionally acts causing any injury:	Class C felony
Recklessly acts causing serious injury:	Class D felony
Recklessly acts causing physical injury:	Aggravated misdemeanor
Intentionally or knowingly acts w/o injury:	Serious misdemeanor
Financial exploitation over \$100:	Class D felony
Financial exploitation \$100 or less:	Simple misdemeanor

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### 235E – DIA Dependent Adult Abuse

- Similar to 235B
- Only applies to health care facilities, hospitals, elder group homes, assisted living or adult day care services
- Only criminal offense – Fail to Report (simple) 235E.2(9)

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### Chapter 714—Theft



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### Chapter 155A – Prohibited Acts Obtaining Rx by Fraud



- Obtain Rx by fraud, deceit, subterfuge, misrepresentation
- If controlled substance, penalties enhanced

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### 235B Protective Orders

- Enter & examine
- Examine finances
- Order for services
- Order for services & to enjoin

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### 235B Protective Orders

- Only DHS can file
- County attorneys rep DHS
- Leads to g/c

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### Special Issues re: Financial Crimes

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## Tools of the Trade



- Joint accounts
- On the deed
- Authorized parties to accounts
- Power of Attorney
- Voluntary conservatorships

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## Joint accounts

- May not have the right to take the property
- Intent is key
- Why is the suspect on the account
- Look at the history



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## Joint accts/Deeds/ Authorized Parties



- Victim have capacity to consent?
- Under duress?
- Undue influence?

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### Mental capacity

- Dementia or other chronic conditions
- UTI, substances, or temporary conditions
- Brain injury
- Must have capacity to make decision

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### Mental Capacity

Financial institutions cannot  
presume aging client has  
capacity when decision is  
against client's interest

State v. Ruebel, 2011 WL 3116243 (Ia App 2011)

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### Duress/Undue Influence

#### Duress:

Imminent threat of serious injury

#### Undue influence:

Act of overpowering the will by abusing the  
trust and confidence of victim

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## Power of Attorney

Private contract between principal and attorney-in-fact

THE STATE OF CALIFORNIA	FOR THE CLERK OF THE COUNTY OF
San Diego	San Diego
JAN 1 2011	
GENERAL POWER OF ATTORNEY	
I, <u>XXXXXXXXXXXXXXXXXXXX</u> , of the County of <u>San Diego</u> , State of <u>California</u> , do hereby certify that the within and foregoing instrument is a true and correct copy of the original instrument as the same appears from the records of the County of <u>San Diego</u> , State of <u>California</u> .	
I hereby make any and all general powers of attorney that may have been previously executed by me, but specifically excluding any powers of attorney for health care decisions which I may have previously executed.	
I, <u>XXXXXXXXXXXXXXXXXXXX</u> , as <u>Attorney-in-Fact</u> , do hereby certify that I have full power and authority to manage and conduct all of my affairs, with full power and authority to execute or perform any act, power, duty, right or obligation I have here or may hereafter acquire the legal right, power and liability to exercise or perform. The power and authority of my Attorney-in-Fact shall include, but not be limited to, the power and authority	

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## Power of Attorney

- Bound by limits of contract
- "Durable" — lasts past incapacity
- Can be revoked at any time
- No centralized registry
- Principal must be competent to sign

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## Power of Attorney Fiduciary Duties

Attorney-in-fact must:

- Act in good faith on the principal's behalf
- Avoid any act of self-dealing
- Only act as authorized by the contract
- Must provide all material facts to principal
- If contract does not expressly allow it, it cannot be done

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## Power of Attorney—Feathering the Nest

POA must specifically authorize self-gifting by attorney-in-fact or it is not allowed

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## Conservators

- Appointed by a judge
- Must report to Court
- Ward cannot make decisions
- Not okay if ward "agrees"
- Only have authority as granted by judge



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## Conservators

Same fiduciary duties as a power of attorney



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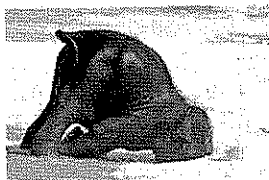
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This Problem is Not Going  
Away...




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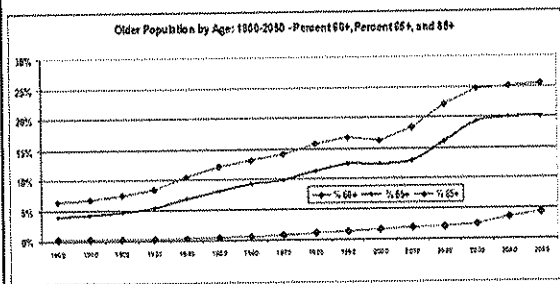
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We're Not Getting Any  
Younger...




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### Iowa 65+ population

Iowa total population:  
2007 to 2030 – almost unchanged

Iowa 65+:  
2010      14.9% of Iowa  
2030      22.4 % of Iowa

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### Kids v. Seniors

2007:

Under 18: 23.9% of Iowa  
65 +: 14.7% of Iowa

2030:

Under 18: 22.4% of Iowa  
65 +: 22.4% of Iowa

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Sure I'm for helping the  
elderly. I'm going to be old  
myself someday.  
—Lillian Carter

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### Resources:

[www.centeronelderabuse.org](http://www.centeronelderabuse.org)  
[www.aging.iowa.gov](http://www.aging.iowa.gov)  
[www.ncall.us](http://www.ncall.us)  
[www.eldersandcourts.org](http://www.eldersandcourts.org)  
[www.ncea.aoa.gov](http://www.ncea.aoa.gov)  
[www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf](http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf)

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